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No. 14-9496

In the Supreme Court of the United States

ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has approximately 9000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the American Bar Association's House of Delegates.

NACDL is dedicated to advancing the just, efficient, and proper administration of justice, including the administration of federal criminal law. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to *amicus* briefs; the consents are reflected on the Court's docket.

NACDL has an interest in this case because it involves the interpretation and application of the Fourth Amendment right to be free from unreasonable seizures. NACDL has a strong interest in ensuring that criminal defendants are not wrongfully prosecuted without probable cause. Providing a civil remedy under 42 U.S.C. § 1983 for the unreasonable deprivations of liberty that result from groundless prosecutions would deter such wrongful prosecutions and help make criminal defendants whole when they occur.

SUMMARY OF ARGUMENT

A prolonged seizure without probable cause violates the Fourth Amendment. The mere fact that the seizure was conducted pursuant to legal process, such as an arrest warrant or indictment, does not obviate the constitutional violation. Because 42 U.S.C. § 1983's plain language creates a cause of action for "the deprivation of *any* rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983 (emphasis added), this Court should recognize the viability of petitioner's claim here, which seeks redress for his weeks-long pretrial detention without probable cause.

By following the well-trod path of "nearly every * * * Circuit" in holding that "malicious prosecution is actionable under the Fourth Amendment," *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (D.C. Cir. 2007), this Court would break no new ground, nor would such a holding impose unreasonable burdens on law enforcement officials. Lower courts have permitted plaintiffs to pursue malicious prosecution claims under § 1983 for nearly half a century. See, *e.g.*,

Beauregard v. *Wingard*, 230 F Supp. 167, 185 (S.D. Cal. 1964). By the time this Court decided *Albright* v. *Oliver*, 510 U.S. 266 (1994), *every* circuit to address the issue had recognized malicious prosecution as a constitutional claim actionable under § 1983 in one form or another.

Although *Albright* rejected the theory that prosecution without probable cause violates an individual's *substantive due process rights*, seven Justices (five of whom concurred in the judgment) recognized the potential viability of Fourth Amendment challenges to groundless prosecutions. See 510 U.S. at 271 (plurality opinion); see also *id.* at 288-291 (Souter, J., concurring in judgment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Thus, *Albright* "left undisturbed" lower courts' "longstanding recognition of a Fourth Amendment right to be free from malicious prosecution." *Kerr* v. *Lyford*, 171 F.3d 330, 339 (5th Cir. 1999), *abrogated on other grounds by Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003). This Court should correct the outlier position staked out by the Seventh Circuit and clarify that, as *ten* circuits have held post-*Albright*, a pretrial seizure without probable cause violates the Fourth Amendment and can give rise to a § 1983 claim, regardless of whether the seizure is conducted pursuant to legal process. Recognizing such claims will deter government agents from abusing their authority and the judicial process and ensure the availability of a federal remedy for constitutional violations.

Decades of experience from the vast majority of regional courts of appeals confirm that recognizing a Fourth Amendment-based malicious prosecution claim does not chill legitimate law enforcement con-

duct. To succeed on a § 1983 malicious prosecution claim, the plaintiff must show that there was no probable cause for his continued pretrial seizure. Law enforcement officers, surely educated in the probable cause standard, have a ready guide for steering clear of actions that may expose them to potential § 1983 liability. Officers are further insulated by the doctrine of qualified immunity. Qualified-immunity determinations are immediately appealable, ensuring that officers are not required to face the burdens of litigation without resolution of "the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Moreover, 42 U.S.C. § 1988 discourages plaintiffs from filing frivolous claims by making attorney's fees available for prevailing defendants. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978).

By emphasizing that claims such as petitioner's are firmly rooted in the text of the Fourth Amendment, this Court can also resolve a minor, technical disagreement among lower courts regarding whether subjective "malice" is an element of § 1983 claims challenging seizures pursuant to legal process. Because Fourth Amendment inquiries are generally conducted under an objective standard, § 1983 plaintiffs should not be required to prove a defendant's subjective malice.

Although not necessary to resolve this case, this Court should also adopt the broad definition of seizure embraced by well-reasoned decisions of lower courts. That definition includes not only physical detention, but also significant pretrial restraints of liberty such as travel restrictions, mandated court ap-

pearances, and obligations to regularly contact pretrial services officers. Correcting the crabbed definition of "seizure" adopted by some lower courts is necessary to give proper scope to the Fourth Amendment, which this Court has recognized requires a judicial determination of probable cause for "*any* significant pretrial restraint of liberty." *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1975) (emphasis added).

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS UNREASONABLE PRETRIAL SEIZURES, EVEN AFTER INITIATION OF LEGAL PROCESS

A. Courts Have Long Recognized That Section 1983 Provides A Remedy For Pretrial Seizures After Initiation Of Legal Process

In *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court recognized that in enacting 42 U.S.C. § 1983, "Congress * * * meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172. The *Monroe* Court, construing the statutory phrase "under color of state law," made clear that § 1983 provides a remedy for "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," whether the official acts "by reason of prejudice, passion, neglect, intolerance or otherwise." *Id.* at 180, 184 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)). Soon after the Court's watershed decision in *Monroe*, courts began allowing individuals subject to baseless prosecution to seek redress under § 1983. See, *e.g.*, *Sullivan* v. *Choquette*, 420 F.2d 674,

675-676 (1st Cir. 1969); *Rue* v. *Snyder*, 249 F. Supp. 740, 743 (E.D. Tenn. 1966); *Beauregard* v. *Wingard*, 230 F. Supp. 167, 185 (S.D. Cal. 1964).

In the early days after *Monroe*, courts did not distinguish harms stemming from arrest, imprisonment, and prosecution; *all* groundless pretrial deprivations of liberty were considered wrongful—and actionable. From the very beginning, courts viewed "prosecut[ion] [of an individual] under circumstances not warranting his prosecution" as an injury every bit as deserving of redress as "arres[t] under circumstances not warranting * * * arrest, [and] imprison[ment] * * * under circumstances not warranting * * * imprisonment." *Rue*, 249 F. Supp. at 742. Thus, when a police officer "sought to use the power of arrest to win a motorists' quarrel" with another driver "in which the [officer] was not altogether blameless," the driver was permitted to bring suit under § 1983. *Id.* at 742-743. So, too, for "a candidate for the office of City Councilman" who was arrested, booked, and tried in an effort to "bring him into disgrace in his community" because "during the political campaign[, he] severely criticized the Chief of Police." *Beauregard*, 230 F Supp. at 170-171. After his acquittal, upon a showing that the "the acts of the [police] were without cause," the court held that the candidate could pursue claims under § 1983 based on both his initial arrest and the subsequent prosecution. *Id.* at 171 & n.3, 185.

As the law continued to develop, courts increasingly recognized the importance of § 1983 as a necessary tool to provide redress, not simply for arrest and imprisonment, but also for the ensuing prosecution. As the Fourth Circuit explained nearly three decades

ago, the Constitution protects against groundless prosecution because "[l]ike an arrest, a prosecution is 'a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.'" *Goodwin* v. *Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (quoting *United States* v. *Marion*, 404 U.S. 307, 320 (1971)). Thus, the Fourth Circuit held that, even where the defendant had been released on bond before trial and thus not incarcerated, that was "not decisive in determining if he has suffered an abridgement of constitutional rights. Being subjected to a prosecution while an officer withheld exculpatory evidence from the prosecutor while urging that the prosecution should go forward can work a constitutional deprivation." *Ibid.*; see also *Strength* v. *Hubert*, 854 F.2d 421, 426 (11th Cir. 1988) ("[A]ny of the pretestimonial acts that might have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action."); *Singleton* v. *City of New York*, 632 F.2d 185, 195 (2d Cir. 1980) ("The essence of the § 1983 claim [for malicious prosecution] is the alleged groundless prosecution, without which there would not be any basis for the claim.").

Decades of experience confirm the value of recognizing a cause of action for unsupported prosecution. Most obviously, courts have recognized the need for § 1983 to deter misconduct and compensate individuals for grossly incompetent, and sometimes malicious, police work resulting in baseless prosecutions. *Golino* v. *New Haven*, 950 F.2d 864 (2d Cir. 1991), is

emblematic of the type of misconduct § 1983 actions have addressed. There, the record indicated that police withheld that eyewitness descriptions foreclosed Golino as a suspect, that fingerprints left by the killer did not match Golino's prints, and that one eyewitness had positively identified the victim's boyfriend as the killer. *Id.* at 871-872. Years after the prosecution began, the charges against Golino were dismissed when a court-ordered blood test confirmed that Golino was not the killer. *Id.* at 866; see also *Singleton*, 632 F.2d at 188 (police falsely charged a robbery suspect with felonious assault and resisting arrest after they became aware that he was not the perpetrator); *Morrison* v. *Jones*, 551 F.2d 939, 940-941 (4th Cir. 1977) (officer arrested and charged bicyclist with "assault with intent to maim, disable, or kill the officer" after the officer injured himself while trying to stop the bicyclist from riding in a bus lane). Without a cause of action under § 1983 for baseless prosecutions, individuals would have no avenue to seek redress for unconstitutional deprivations of liberty that continue after formal process is initiated—and law enforcement officials would have little incentive to refrain from prosecuting such cases.

The prospect of malicious-prosecution liability likewise deters officers who can establish "probable cause as to a lesser offense [from wrongfully] tack[ing] on more serious, unfounded charges which would support a high bail or lengthy detention." *Posr* v. *Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); see also *Janetka* v. *Dabe*, 892 F.2d 187, 189 (2d Cir. 1989) ("Allowing police officers to add unwarranted misdemeanor charges to valid violation charges may force

an accused to go to trial on the misdemeanor when he otherwise would plead to the violation.").

By the time this Court decided *Albright* v. *Oliver*, 510 U.S. 266 (1994), *every* circuit to address the issue had recognized malicious prosecution as a constitutional claim actionable under § 1983 in one form or another.[2] Although some courts of appeals required a showing of governmental action "so egregious" as to "shock the conscience" in order to recover under § 1983, *e.g.*, *Morales* v. *Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990), others focused on what this Court found compelling in *Albright*: the familiar Fourth Amendment inquiry into the presence or absence of probable cause, and the bedrock right not to be "prosecut[ed] * * * 'in bad faith'—i.e. without probable cause." *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 258 (5th Cir. 1984) ("[T]here is a federal right to be free from bad faith prosecutions." (quoting *Shaw* v. *Garrison*, 467 F.2d 113, 120 (5th Cir. 1972))); see also, *e.g.*, *Strength*, 854 F.2d at 425-426; *Losch* v. *Borough of Parkesburg*, 736 F.2d 903, 907-908 (3d Cir. 1984) ("It is clear that the filing of charges without probable cause and for reasons of personal animosity is actionable under § 1983.").

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[2] See *Morales* v. *Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Raysor* v. *Port Auth.*, 768 F.2d 34, 39 (2d Cir. 1985); *Losch* v. *Borough of Parkesburg*, 736 F.2d 903, 907-908 (3d Cir. 1984); *Goodwin* v. *Metts*, 885 F.2d 157, 163 (4th Cir. 1989); *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 260 (5th Cir. 1984); *Vasquez* v. *City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985); *Inada* v. *Sullivan*, 523 F.2d 485, 486-488 (7th Cir. 1975); *Kohl* v. *Casson*, 5 F.3d 1141, 1145 (8th Cir. 1993); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 561-562 (9th Cir. 1987); *Robinson* v. *Maruffi*, 895 F.2d 649, 653-655 (10th Cir. 1990); *Strength* v. *Hubert*, 854 F.2d 421, 425-426 (11th Cir. 1988).

B. In The Decades Since *Albright*, The Vast Majority Of Circuit Courts Have Concluded That Unreasonable Pretrial Seizures After Initation Of Legal Process Violate The Fourth Amendment

In *Albright*, a majority of this Court concluded that prosecution without probable cause does not violate an individual's substantive due process rights. 510 U.S. at 271. But *Albright* did not alter the prevailing view of the basic rights afforded under the Fourth Amendment. See *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 115 (2d Cir. 1995). Indeed, seven Justices in *Albright* recognized the potential viability of Fourth Amendment-based malicious prosecution claims. See 510 U.S. at 271 (plurality opinion); see also *id.* at 288-291 (Souter, J., concurring in judgment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Thus, after *Albright*, courts continued to recognize that law enforcement officials have a duty "to refrain from engaging in acts which continue[] a person's detention without probable cause," *Gregory* v. *City of Louisville*, 444 F.3d 725, 749 (6th Cir. 2006), explaining that *Albright* "left undisturbed" the courts' "longstanding recognition of a Fourth Amendment right to be free from malicious prosecution," *Kerr* v. *Lyford*, 171 F.3d 330, 339 (5th Cir. 1999), *abrogated on other grounds by Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2003). As a result, in the years since *Albright*, "nearly every * * * Circuit has held that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause." *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (D.C. Cir. 2007); accord *Hernandez-*

Cuevas v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) ("[E]ach of the * * * Courts of Appeals to directly address in the years since *Albright* whether the Fourth Amendment provides protection against pretrial detention without probable cause has concluded that it does.").

Shortly after *Albright*, virtually every court to consider the issue concluded that plaintiffs may challenge pretrial restraints on liberty under the Fourth Amendment.[3] Thus while "*Albright* implies that prosecution without probable cause is not, in and of itself, a constitutional tort," the "deprivation of liberty accompanying the prosecution" may serve as a "constitutional violation" for purposes of a § 1983 claim. *Gallo* v. *City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998).

Today, *ten* circuit courts have held that pretrial restraints without probable cause violate the Fourth Amendment.[4] Though sometimes styled as "mali-

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[3] See *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 114-115 (2d Cir. 1995); *Hilfirty* v. *Shipman*, 91 F.3d 573, 575, 577 (3d Cir. 1996); *Gallo* v. *City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998); *Brooks* v. *City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996); *Eugene* v. *Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303-1304 (5th Cir. 1995); *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999); *Poppell* v. *City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998); *Taylor* v. *Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *Whiting* v. *Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996).

[4] See *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 115-116 (2d Cir. 1995); *Gallo* v. *City of Phila.*, 161 F.3d 217, 224-225 (3d Cir. 1998); *Lambert* v. *Williams*, 223 F.3d 257, 262 (4th Cir. 2000); *Castellano* v. *Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003); *Gregory* v. *City of Louisville*, 444 F.3d 725, 748-749 (6th Cir. 2006); *Galbraith* v. *Cty. of Santa Clara*, 307 F.3d 1119, 1127

cious prosecution" claims, courts recognize that such actions simply seek redress for "continued detention without probable cause." *Gregory*, 444 F.3d at 749. Accordingly, the "malicious prosecution" label serves as a "shorthand way of describing" a quintessential "section 1983 claim: the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Whiting* v. *Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). Even the Seventh Circuit—an outlier nationally—permits such claims under § 1983 where state law remedies are inadequate. See *Parish* v. *City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009).

To prevail on a malicious prosecution claim under the Fourth Amendment, a plaintiff must show "some deprivation of liberty consistent with the concept of 'seizure.'" *Singer*, 63 F.3d at 116. Further, since malicious prosecution implies an abuse of judicial process, "a plaintiff pursuing such a claim under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Murphy* v. *Lynn*, 118 F.3d 938, 944 (2d Cir. 1997); accord *Gallo*, 161 F.3d at 222 ("Gallo must show that he suffered a seizure as a consequence of a legal proceeding."); *Sykes* v. *Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) (malicious prosecution "remedies detention accompanied not by absence of legal process, but by *wrongful institution* of legal process").

(9th Cir. 2002); *Taylor* v. *Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *Whiting* v. *Traylor*, 85 F.3d 581, 584 (11th Cir. 1996); *Pitt* v. *District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007).

Many circuits have recognized that the "deprivations of liberty" actionable under § 1983 are not limited to traditional custodial seizures. For example, the Third Circuit has observed that, while pretrial restraints such as the obligation "to go to court and answer * * * charges" may not have "the feel of a seizure because [they are] effected by authority of the court, not by the immediate threat of physical force[,] [f]orce * * * lies behind the court's commands as it lies behind the policeman's 'Stop.'" *Gallo*, 161 F.3d at 223.

These observations are consistent with this Court's decision in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). There, the Court recognized that liberty deprivations regulated by the Fourth Amendment are not limited to physical detention, holding that "pretrial release * * * accompanied by burdensome conditions that effect a significant restraint on liberty * * * requires a judicial determination of probable cause." *Id.* at 114. *Terry* v. *Ohio*, 392 U.S. 1 (1968), likewise demonstrates that seizures can be of different intensities. While an arrest is the most common type of seizure, even a brief investigative stop can constitute a Fourth Amendment seizure. *Id.* at 16-18. Courts have relied on this reasoning to conclude that restrictions on travel, as well as mandatory attendance at court hearings, are restraints on liberty that fall within the ambit of the Fourth Amendment. See *Gallo*, 161 F.3d at 223; accord *Murphy*, 118 F.3d at 946.

In the years since *Albright*, courts have underscored the importance of malicious prosecution claims in deterring and remedying "misconduct in the criminal context" by focusing in on "the abuse of the judicial process by government agents." *Gallo*, 161 F.3d

at 225. The Federal Reporter is replete with instances of unreasonable action by police officers and prosecutors, from "deliberate attempt[s] to ensure the prosecution and conviction of an innocent man," *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1300 (10th Cir. 2004), to the initiation of criminal proceedings "despite overwhelming evidence of * * * innocence," *Pitt*, 491 F.3d at 498, and general "perversion of proper legal procedures," *Singer*, 63 F.3d at 117. As the Third Circuit noted, "[e]xcept when an innocent defendant is executed, we hardly can conceive of a worse miscarriage of justice." *Halsey* v. *Pfeiffer*, 750 F.3d 273, 278 (3d Cir. 2014). It is "fundamental to our American system of justice" that prosecutors and police officers are "prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Hernandez-Cuevas*, 723 F.3d at 100.

The Fourth Amendment's protection against pretrial restraints without probable cause is "one constitutional source of this 'self-evident' prohibition against manufactured evidence." *Ibid.* Recognizing malicious prosecution claims under the Fourth Amendment enables citizens to protect their constitutional rights and prevent abuse of the judicial process. The "constitutionally secured right of an accused in a criminal case" to be free from restraint unsupported by probable cause "was not seeded in the common law of tort where duties are the product of judicial choice," but is instead firmly rooted in the Fourth Amendment's text. *Castellano*, 352 F.3d at 958.

II. DECADES OF EXPERIENCE CONFIRM THAT RECOGNIZING MALICIOUS PROSECUTION CLAIMS BASED ON THE FOURTH AMENDMENT DOES NOT CHILL LEGITIMATE LAW ENFORCEMENT CONDUCT

A. The Existence Of Probable Cause Precludes Liability

In bringing a Fourth Amendment malicious prosecution claim, the plaintiff bears the burden of demonstrating that there was no probable cause for his continued pretrial detention. It is axiomatic that a seizure violates the Fourth Amendment only if the government lacked probable cause.[5] Therefore, "[t]he absence of probable cause is a necessary element of § 1983 false arrest and malicious prosecution claims" brought under the Fourth Amendment. *Yousefian* v. *City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015).

Probable cause, as the name suggests, "deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois* v. *Gates*, 462 U.S. 213, 231

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[5] In most circumstances, probable cause is a requirement for a reasonable seizure. See 2 Wayne R. LaFave, *Search and Seizure* § 3.1(a) (5th ed. 2015). A lesser showing is permissible only in a narrow range of circumstances. See, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 486 U.S. 444, 447 (1990) (sobriety checkpoints); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341 (1985) (searches of students by public school administrators); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (fixed border patrol checkpoints); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968) (brief investigative stops); *Camara* v. *Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 538 (1967) ("special needs" search of regulated party pursuant to municipal housing codes).

(1983) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949)). Courts have recognized that this standard, which is based on the "nontechnical, common-sense judgments of laymen," gives appropriate guidance to law enforcement officials in determining when seizure is permissible. *Id.* at 235-236. Because this familiar standard is at the root of malicious prosecution claims, law enforcement officials have a ready guide for steering clear of actions that may expose them to § 1983 liability.

This standard also helps filter out questionable Fourth Amendment claims brought by § 1983 plaintiffs. Substantively, such plaintiffs must generally establish a lack of probable cause in the face of a neutral magistrate's conclusion that probable cause *did* exist, or a grand jury's indictment predicated on its existence. See, *e.g.*, *Massey* v. *Ojaniit*, 759 F.3d 343, 357 (4th Cir. 2014) (affirming judgment on the pleadings for government defendants because plaintiff could not overcome grand jury finding of probable cause). Plaintiffs can clear this hurdle with evidence of egregious misconduct, such as "fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Manganiello* v. *City of New York*, 612 F.3d 149, 162 (2d Cir. 2010) (quoting *Savino* v. *City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). Even if such misconduct can be shown, the plaintiff's claim *still* may fail if there was nonetheless non-tainted evidence sufficient to support probable cause. See, *e.g.*, *Taylor* v. *Meacham*, 82 F.3d 1556, 1562-1563 (10th Cir. 1996) (affirming summary judgment for the defendant because there was sufficient independent evidence of probable cause);

Durham v. *Horner*, 690 F.3d 183, 188-189 (4th Cir. 2012) (same).

Procedurally, the determination whether probable cause exists is a legal question, involving application of a familiar standard. Malicious prosecution cases are thus routinely resolved on probable cause grounds at the motion-to-dismiss stage, see, *e.g.*, *Meeks* v. *Larsen*, 611 Fed. Appx. 277, 282-283 (6th Cir. 2015); *Amato* v. *Pa. Office of Att'y Gen.*, 183 Fed. Appx. 260, 263-264 (3d Cir. 2006); *Almeida* v. *Rose*, 55 F. Supp. 3d 200, 204-205 (D. Mass. 2014), or on motion for summary judgment, see, *e.g.*, *Calvert* v. *Ediger*, 415 Fed. Appx. 80 (10th Cir. 2011); *Boydston* v. *Isom*, 224 Fed. Appx. 810, 815 (10th Cir. 2007). Adverse determinations are subject to *de novo* review. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). Thus, in the specific context of Fourth Amendment malicious prosecution claims, this Court has recognized that the probable cause issue has a "high probative force" and low judicial "cost." *Hartman* v. *Moore*, 547 U.S. 250, 265-266 (2006).

B. Qualified Immunity Protects Defendants From Questionable Claims

Immunity doctrines further protect defendants from questionable claims. As an initial matter, prosecutors generally face no threat of liability because they are protected by absolute immunity for their duties "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430-431 (1976); see also *Burns* v. *Reed*, 500 U.S. 478, 491, 494 (1991) (prosecutors have immunity for their duties "involv[ing] the prosecutor's role as advocate for the State" and "connected with the prosecu-

tor's role in judicial proceedings" (internal quotation marks omitted)).

Though not absolutely immune, law enforcement officials are still protected by qualified immunity, which shields a government official from liability unless the plaintiff shows *both* that the official violated the Constitution *and* that the unconstitutionality of the official's conduct was clearly established at the time the official acted.[6]

The layering of the qualified-immunity reasonableness inquiry on top of the "practical, commonsense" standard for determining the existence of probable cause provides particular protection to law enforcement officials. *Gates*, 462 U.S. at 238. Because "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," the Court has held that "in such cases th[e] officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Therefore, even if a plaintiff can establish a lack of probable cause, the defendant is still immune if the question of whether probable cause existed under the case's particular facts was reasonably debatable, such that the defendant's conduct fell "in the hazy border" between legality and illegality. *Brosseau* v. *Haugen*, 543 U.S.

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[6] After *Pearson* v. *Callahan*, 555 U.S. 223 (2009), courts are free to consider those two requirements in either order and typically address them in the manner that allows the court to most quickly dispose of the case. See, *e.g.*, *Durham*, 690 F.3d at 188 n.6 (4th Cir. 2012) ("[W]e are entitled to evaluate the two qualified immunity inquiries in either order. Because we can dispose of this case on the first step, we turn immediately to it.")

194, 201 (2004) (per curiam) (internal quotation marks omitted). Thus, even the mistaken judgments of law enforcement officials will not expose them to liability so long as they are reasonable.

Furthermore, qualified-immunity determinations are immediately appealable. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Qualified immunity gives officers "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* at 526. Thus, malicious prosecution defendants whose requests for qualified immunity are denied at the district court level can immediately seek appellate reversal. Immediate appellate review of adverse decisions is available to officials at both the motion-to-dismiss stage, see, *e.g.*, *Johnson* v. *Moseley*, 790 F.3d 649, 654-656 (6th Cir. 2015); *Arrington* v *City of New York*, 686 Fed. Appx. 46, 47-49 (2d Cir. 2015); *Rhodes* v. *Prince*, 273 Fed. Appx. 328, 330 (5th Cir. 2008), and the summary-judgment stage, see, *e.g.*, *Wood* v. *Kesler*, 323 F.3d 872, 882-883 (11th Cir. 2003); *Rohman* v. *New York City Transit Auth.*, 215 F.3d 208, 218 (2d Cir. 2000); *Lennon* v. *Miller*, 66 F.3d 416, 425 (2d Cir. 1995). *Mitchell*'s doctrine of immediate appealability ensures that meritless § 1983 malicious prosecution claims can be quickly defeated.

C. The Availability of Attorney's Fees Under 42 U.S.C. § 1988 Discourages Frivolous Claims

The availability of attorney's fees for prevailing defendants provides still further protection against

baseless Fourth Amendment malicious prosecution claims under § 1983. Federal law authorizes a prevailing party to seek attorney's fees in § 1983 cases, and this remedy is available to plaintiffs and defendants alike. See 42 U.S.C. § 1988(b). Prevailing defendants may be awarded attorney's fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). In malicious prosecution actions, courts have awarded fees to prevailing defendants where plaintiffs have ignored evidence clearly establishing probable cause to proceed with a prosecution. See, *e.g.*, *Fisher* v. *Wal-Mart Stores, Inc.*, 619 F.3d 811, 818-819 (8th Cir. 2010); *Thorpe* v. *Ancell*, 367 Fed. Appx. 914, 923-924 (10th Cir. 2010); *Abrams* v. *Pack*, Civ. A. Nos. 84-4341, 85-3174, 1987 WL 13095, at *1-2 (E.D. Pa. June 26, 1987). The threat of such fee awards provides a significant deterrent against § 1983 plaintiffs' pursuit of patently meritless malicious prosecution claims.

III. THIS COURT CAN PROVIDE DIRECTION TO LOWER COURTS BY CLARIFYING THAT MALICE IS NOT AN ELEMENT OF A § 1983 CLAIM GROUNDED ON THE FOURTH AMENDMENT AND BY ADOPTING JUSTICE GINSBURG'S VIEW OF CONTINUING SEIZURE

By holding that claims such as petitioner's are rooted in the text of the Fourth Amendment, this Court can provide needed guidance to lower courts. Adopting a Fourth Amendment-based approach would mean that lower courts evaluating such claims would apply a straightforward, objective test familiar from decades of use, under which subjective elements

such as malice would be unnecessary. Additionally, if this Court adopts the conception of continuing seizure set forth in Justice Ginsburg's concurring opinion in *Albright*, it would clarify the definition of seizure for lower courts and vindicate individuals' constitutional rights.

A. Because Fourth Amendment Inquiries Are Objective, Malice Is Not A Required Element For § 1983 Fourth Amendment Claims

Adopting the elements of the common-law malicious prosecution tort wholesale, some courts of appeals require § 1983 plaintiffs to present evidence of the defendant's subjective intent, or malice, directed toward the plaintiff. See *Manganiello*, 612 F.3d at 161; *McKenna* v. *City of Phila.*, 582 F.3d 447, 461 (3d Cir. 2009);[7] *Yousefian*, 779 F.3d at 1015; *Grider* v. *City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010). Other circuits, recognizing that proof of subjective malice is generally not required to establish a Fourth Amendment violation, do not require proof of malice to establish a § 1983 claim. See *Hernandez-Cuevas*, 723 F.3d at 100-101 (adopting a "purely constitutional approach" that does not require proof of malice); *Evans* v. *Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (stating that a "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorpo-

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[7] But see *Gallo*, 161 F.3d at 222 n.6 (interpreting *Albright* to suggest "a plaintiff would not need to prove all of the common law elements of the [malicious prosecution] tort" to succeed on claim, and further stating that under a Fourth Amendment framework, "it is unclear why a plaintiff would have to show that the police acted with malice").

rates certain elements of the common law tort," but not malice (quoting *Lambert* v. *Williams*, 223 F.3d 257, 261 (4th Cir. 2000))); *Castellano*, 352 F.3d at 954-955 (taking a purely constitutional approach to § 1983 malicious prosecution claims); *Sykes*, 625 F.3d at 309 ("In the context of malicious prosecution, the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice."); *Pierce*, 359 F.3d at 1288-1289 (explaining the circuit's approach of using the elements of the common law tort as a "starting point" for § 1983 claim analysis, but rejecting party's argument that "proof of each element of the common law tort * * * is a necessary predicate to a claim under § 1983," and further stating that "the ultimate question is always whether the plaintiff has alleged a constitutional violation").[8]

This Court should adopt the approach taken by the courts that do not require proof of malice. Although "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here," *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994), nothing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis.[9] To determine whether a pre-

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[8] The D.C. Circuit has not clearly decided whether malice is required. See *Pitt*, 491 F.3d at 511 (stating simply that "[w]e join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment").

[9] Under *Heck*, however, the malicious prosecution tort's favorable-termination requirement *is* relevant to the separate question of when a § 1983 cause of action challenging a pretrial

trial deprivation of liberty pursuant to legal process violates the Fourth Amendment, a court must consider (1) whether the deprivation constitutes a "seizure" for purposes of the Fourth Amendment, and (2) whether any such seizure was supported by probable cause. These are wholly objective inquiries that do not involve any consideration of the defendant official's subjective state of mind. See, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (stating that an otherwise objectively reasonable seizure is not rendered unreasonable by an officer's subjective intentions); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Clarifying that "malice" is not an element of § 1983 claims such as petitioner's will eliminate the doctrinal disagreement among the lower courts on this technical issue. It will also avoid any risk that subjective analyses of malice in § 1983 civil suits might improperly enter into Fourth Amendment inquiries in criminal cases.[10]

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seizure pursuant to legal process *accrues* (and thus the statute of limitations begins to run). *Heck*, 512 U.S. at 489-490. Although a § 1983 claim such as petitioner's accrues when the underlying criminal proceeding terminates in the plaintiff's favor, that provides no basis for incorporating a subjective inquiry regarding malice into the constitutional tort.

[10] Holding that "malice" is not an element of the § 1983 tort would not mark a sea change in the law, nor would it risk undermining state-law tort remedies that require proof of malice. In common-law malicious prosecution actions, malice may be inferred from a lack of probable cause, the basic prerequisite for a Fourth Amendment violation. See, *e.g.*, *Stewart* v. *Sonneborn*, 98 U.S. 187, 194 (1878); *Staunton* v. *Goshorn*, 94 F 52, 57 (4th Cir. 1899); *Cloon* v. *Gerry*, 79 Mass. (13 Gray) 201, 202 (1859);

B. The Court Should Hold, Consistent With Justice Ginsburg's *Albright* Concurrence, That Pretrial Restraints Short Of Official Custody Can Constitute Fourth Amendment "Seizures"

There is separate disagreement among lower courts that recognize § 1983 malicious prosecution claims on the definition of "seizure." Although this Court need not resolve the issue because petitioner's pretrial detention clearly constituted a seizure,[11] if the Court reaches the question, it should adopt the continuing seizure rationale set forth in Justice Ginsburg's concurring opinion in *Albright*. 510 U.S. at 277-279 (Ginsburg, J., concurring).

In *Albright*, Justice Ginsburg explained that at common law, "an arrested person's seizure was deemed to continue even after release from official custody." 510 U.S. at 277-278. Therefore, any distinction between pretrial incarceration and post-bail, pretrial restraints of movement or liberty was merely "a distinction between *methods* of retaining control over a defendant's person, not one between seizure and its opposite." *Id.* at 278 (emphasis added). As Justice Ginsburg explained, "[a] person facing serious criminal charges is

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Restatement (Second) of Torts § 669 (1977). Therefore, a § 1983 plaintiff who establishes a Fourth Amendment violation could, if required, use the same evidence to prove malice. See *Manganiello*, 612 F.3d at 163 (explaining in § 1983 case that "[a] lack of probable cause generally creates an inference of malice" (quoting *Boyd* v. *City of New York*, 336 F.3d 72, 78 (2d Cir. 2003))).

[11] See *Manuel* v. *City of Joliet*, 590 Fed. Appx. 641, 642 (7th Cir. 2015) (describing the circumstances of Manuel's arrest and weeks-long detention); see also *Albright*, 510 U.S. at 276 (noting that "submission to arrest unquestionably constitute[s] a seizure") (Ginsburg, J., concurring).

hardly freed from the state's control upon his release from a police officer's physical grip." *Ibid.* Such an individual "is required to appear in court at the state's command," is often subject to travel restrictions, and is likely to face severely diminished employment prospects, reputational harm, and financial and emotional strain pending trial. *Ibid.*; accord *Gerstein*, 420 U.S. at 114 ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty"). Therefore, a defendant "remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). At least three other Justices in *Albright* agreed with Justice Ginsburg's reasoning that a Fourth Amendment "seizure" may continue after a defendant is released from custody pending trial. See *id.* at 290 (Souter, J., concurring) (indicating that imposition of "bond terms" implicates Fourth Amendment); *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting) (agreeing with Justice Ginsburg's "explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable").

Since *Albright*, the Second Circuit has endorsed a theory of "continuing seizure," holding that pretrial release conditions, including out-of-state travel restrictions and requirements to appear in court, amount to a Fourth Amendment seizure. See *Rohman*, 215 F.3d at 216; *Murphy*, 118 F.3d at 946. The Third Circuit has likewise held that certain pretrial release conditions, such as travel restrictions, can amount to a seizure. See *Gallo*, 161 F.3d at 222 (holding that a combination of post-indictment restrictions—requirements to post a

$10,000 bond, not travel outside New Jersey and Pennsylvania, contact pretrial services weekly, and attend all court hearings—constituted a seizure).

Some circuits disagree, holding that pretrial release conditions, such as requirements to attend pretrial hearings and restrictions on out-of-state travel, do not give rise to a Fourth Amendment seizure. See *Harrington* v. *City of Nashua*, 610 F.3d 24, 32-33 & n.4 (1st Cir. 2010); *Karam* v. *City of Burbank*, 352 F.3d 1188, 1193-1194 (9th Cir. 2003); *Nielander* v. *Board of Cty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009); *Kingsland* v. *City of Miami*, 382 F.3d 1220, 1235-1236 (11th Cir. 2004). Those decisions, however, conflict with this Court's precedent. This Court has explained that "[a] person is seized by the police * * * when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement 'through means intentionally applied.'" *Brendlin* v. *California*, 551 U.S. 249, 254 (2007) (quoting *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991), and *Brower* v. *Cty. of Inyo*, 489 U.S. 593, 597 (1989)) (emphasis omitted). When the circumstances of a situation are ambiguous, this Court has asked "whether a reasonable person * * * would have believed himself free to 'terminate the encounter' between the police and himself." *Id.* at 256-257 (quoting *Bostick*, 501 U.S. at 436); see also *Scott* v. *Harris*, 550 U.S. 372, 381 (2007) ("[A] Fourth Amendment seizure [occurs] * * * when there is a governmental termination of freedom of movement through means intentionally applied." (alterations in original)); *United States* v. *Drayton*, 536 U.S. 194, 201 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.").

These articulations of what constitutes a seizure are consistent with Justice Ginsburg's opinion in *Albright*. Pretrial restrictions of liberty and movement, such as travel restrictions or the requirement to make several court appearances, are "intentionally applied," and criminal defendants lack any independent authority to "terminate" such restrictions, which are generally backed up by the threat that pretrial release may be revoked if the restrictions are violated.

This conception of what constitutes a seizure is appropriate to effectuate the protections intended by the Fourth Amendment. As at common law, seizure under the Fourth Amendment is not limited to circumstances where an individual is incarcerated before trial. It encompasses other pretrial restrictions on liberty short of physical detention, such as travel restrictions when an individual is released on bond, requirements to appear in court before trial, and obligations to regularly contact pretrial services officers. See, *e.g.*, *Rohman*, 215 F.3d at 216; *Gallo*, 161 F.3d at 222; see also *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring) (defendant released pretrial may still be "'seized' in the constitutionally relevant sense"). Because the Fourth Amendment requires a judicial determination of probable cause for "*any* significant pretrial restraint of liberty," *Gerstein*, 420 U.S. at 125-126 (emphasis added), this Court should correct the crabbed definition of "seizure" adopted by some lower courts, which unduly limits the Fourth Amendment's protections.

CONCLUSION

For these reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted.

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